INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 466

SECURITIES AND EXCHANGE COMMISSION, PETITIONER

v.

LOUISIANA PUBLIC SERVICE COMMISSION, MIDDLE SOUTH UTILITIES, INC., and LOUISIANA POWER & LIGHT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION

OPINIONS BELOW

The findings and opinion of the Securities and Exchange Commission of March 20, 1953, have now been reported at 35 S. E. C. 1.

ARGUMENT

I. THE LOUISIANA COMMISSION MADE NO OFFER TO PROVE A CHANGE IN CONDITIONS SINCE THE 1953 ORDER

The Louisiana Commission implies that its petition to reopen the 1953 proceeding was based on changed conditions subsequent to the S. E. C.'s 1953 order (Br. 3, 9, 20). However, an examination of

the entire offer of proof, which (with the exception of certain exhibits not here material) is in the printed transcript of record (R. 1–49), demonstrates that there was no offer to prove changed circumstances. (See, in particular, R. 5.) As we pointed out in our principal brief (p. 35, fn. 35), the fact that the offer of proof was based in part on a study derived from data more recent than the 1952 figures that had been available at the time of the 1953 hearing does not indicate a change of conditions. The S. E. C. specifically found no such change (R. 132), and the court below relied solely on allegations that the conditions at the time of the entry of the 1953 order were otherwise than shown by the record then before the Commission (R. 138).

Louisiana Power also states (Br. 5) that in the 1953 hearing its president "testified that he estimated that there would be a loss of economies in the gas properties on the order of $250,000, based on his experience in operating these properties of Louisiana from its organization in 1927."[1] This is to be compared with the alleged loss of economies of some $272,816 in the offer of proof (R. 7). Since the offer of proof was based on figures for the year 1954, when gas revenues were $5,264,186 (R. 16), as compared to gas revenues of $3,977,364 for 1952 (R. 125), the percentage of loss of economies, on

[1] No record reference is given for this assertion and we have been unable to locate it in the president's testimony. As noted in the Louisiana Power brief (p. 5), the S. E. C. pointed out in its opinion: "No study of any kind was introduced to show what the expense of the gas properties would be if they were to be operated as a separate unit." And see note 2, *infra*.

the basis of the alleged testimony of the president of Louisiana Power, *decreased* from 6.3% of gas revenues in the year 1952 to 5.2% thereof in the year 1954.[2]

II. RESPONDENTS' CONTENTIONS RESPECTING REVIEWABILITY OF A DENIAL TO REOPEN A SECTION 11 (b) PROCEEDING ARE WITHOUT MERIT

The respondents Louisiana Commission (Br. 17–19) and Louisiana Power (Br. 23) urge that the last sentence of Section 11 (b), providing for judicial review of "any order made under [Section 11 (b)]", was inserted to emphasize that all orders under that section could be reviewed, including an order denying a petition to revoke or modify an order under that subsection. Louisiana Power cites in this connection a colloquy between Senators Borah and Wheeler on June 10, 1955. It is clear in context, however, that this colloquy related only to the review of an order of divestment or of corporate simplification. Indeed, in the drafts of the bill before the Senate on that date (S. 2796, 74th Cong., 1st Sess.), the last two sen-

[2] In the "Statement" in its brief (pp. 4–5), Louisiana Power stresses the fact that, from the date of the S. E. C.'s notice of the Section 11 (b) (1) hearing in 1953, only three weeks elapsed until the hearing, and that Louisiana Power did not have time to make a separation study estimating the loss of economies to its gas properties (pp. 4–5). It does not point out, however, that it never asked for any extension of time and, indeed, there is no indication that the company ever contemplated such a study. Had Louisiana Power believed that it was deprived of due process of law or that there was any other procedural error, it could have remedied the situation by petitioning for review in 1953 within the time provided by the statute.

tences of Section 11 (b), providing for revocation or modification of previous orders and specifically for review of Section 11 (b) orders, were not included. The more reasonable explanation for the subsequent insertion of the last sentence of Section 11 (b) is that Congress deemed a specific review provision necessary to make clear that an integration or corporate simplification order entered under Section 11 (b) is reviewable, even though, to effectuate such an order, a subsequent S. E. C. order is necessary.[3] Con-

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[3] See, *e. g.*, *Commonwealth & Southern Corp.* v. *S. E. C.*, 134 F. 2d 747, at 751 (C. A. 3):

"The orders to be entered by the Commission under Section 11 (b) are fundamentally directions that the companies involved achieve a stated result in integration of operations, divestment of nonintegrated properties, simplification of corporate structure or distribution of voting power in order to meet the standards established by the section. While these orders are final and binding determinations of the result to be achieved it seems clear that Congress intended that the Commission might leave open for later consideration the detailed means by which the result directed should be accomplished.

"It is obvious that in many cases the desired result may be reached in more than one way. Congress evidently intended to permit the Commission to leave to the company involved the initiative in suggesting from among the available alternative methods that one which it deems most appropriate. This seems clear in the light of the fact that under Section 11 (e) the company is not restricted to proposing a plan of compliance which it is in a position to carry out itself but it may also propose a plan affecting the rights of third persons which it may, through the Commission, request a court to enforce against the opposition of those third persons. It is only if the Company does not propose a plan which the Commission and the court approve that the Commission under Section 11 (d) itself may propose and seek enforcement of a plan against the opposition of the company."

gress apparently feared that it would be contended that a Section 11 (b) order is interlocutory in nature and hence not directly reviewable and sought to preclude this contention, as well as to emphasize the final and binding character of Section 11 (b) determinations. A similar provision is not contained in other sections of the Act since Section 11 (b) is unique in that orders thereunder require subsequent proceedings and orders by the S. E. C.

Of course, orders under Section 11 (b) revoking or modifying previous orders are reviewable, but we submit that action by the Commission, which for convenience takes the form of an order but which the Act does not in terms require to be effectuated by order, may not be reviewable. (See our principal brief, p. 31.) For example, it is clear that an order of the Commission setting a Section 11 (b) proceeding down for hearing is not reviewable.[4] In this case, the S. E. C. neither revoked nor modified a Section 11 (b) order. Nor, as pointed out at page 33 (fn. 34) of our principal brief, did it reopen the earlier proceeding and, after an evidentiary hearing, reaffirm its earlier order. Hence, the cases cited at page 23 (fn. 8) of the Louisiana Commission's brief are wholly inapposite.

In any event, even assuming *arguendo* that some review is permitted of the S. E. C.'s *denial* of a petition to reopen, it certainly does not follow that the review is unlimited as to scope or standards. (See our principal brief, pp. 32–36.)

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[4] See *Eastern Utilities Associates* v. *S. E. C.*, 162 F. 2d 385 C. A. 1).

III. DETERMINATIONS AS TO DIVESTMENTS OF PROPERTIES ARE GOVERNED BY THE STANDARDS OF SECTION 11 (b) (1) AND NOT BY THE PROVISIONS OF OTHER SECTIONS OR THE DESIRES OF LOCAL AUTHORITIES

Louisiana Power contends that the action of the S. E. C. in requiring the separation of its non-electric properties from the electric properties of the Middle South system was contrary to the "express intent of Congress as set out in the Act" (Br. 13). It correctly points out that the objectives which the Act sought to achieve and the evils which it sought to cure are set forth in Section 1 (b) of the Act (Br. 15). It erroneously states, however, that none of the evils therein enumerated would be eliminated by the S. E. C.'s 1953 order, and that the order would not further the "public interest" or the interest of "investors" or "consumers" (Br. 13). This argument ignores the provision of Section 1 (b) (4) "that the national public interest, the interest of investors * * * and the interest of consumers * * * are or may be adversely affected— * * * (4) when the growth and extension of holding companies bears no relation to * * * the integration and coordination of related operating properties."

Section 11 (b) (1) of the Act is the section which implements this objective by setting forth the standards for the retention of existing combinations of properties. Although Section 11 was designed "to create conditions under which effective Federal and State regulation * * * [would] be possible,"[5] the

[5] See S. Rep. No. 621, 74th Cong., 1st Sess., p. 11, quoted in *North American Company* v. *S. E. C.*, 327 U. S. 686 at 704, n. 14.

standards to achieve that end were those determined solely by Congress. There is no reference whatsoever in Section 11 to considerations of local or State policy. This omission in Section 11 is significant, since when Congress intended that local policy or the policy of State regulatory authorities should be controlling—as is the case with certain provisions where uniformity on a nationwide basis was apparently considered less important—it made specific provision to that effect in the Act.[6] Indeed, in Section 10 (f), in

[6] Thus, under the third sentence of Section 6 (b), the S. E. C. is required to exempt the issue and sale by a subsidiary of a registered holding company of securities issued solely to finance its business, if the issue and sale have been expressly authorized by the appropriate State commission.

Section 7 (g) provides that the S. E. C. shall not permit a declaration regarding the issue or sale of a security by a registered holding company or subsidiary thereof to become effective, if the appropriate State commission informs the S. E. C. that applicable State laws had not been complied with, until and unless the S. E. C. is satisfied that such compliance has been effected.

Section 8, discussed *infra* p. 10, prohibits a registered holding company or any subsidiary thereof from acquiring indirect interests in both gas and electric utilities serving substantially the same territory unless express approval of a State commission is obtained where State law prohibits, or requires approval or authorization for, the direct acquisition of such properties.

Section 9 (b) (1) provides that approval by the S. E. C. of the acquisition by a public utility company of utility assets need not be obtained if such acquisition has been expressly authorized by a State commission.

Section 9 (b) (2) provides that approval by the S. E. C. need not be obtained for the acquisition by a public utility company of securities of its subsidiary public utility company where both companies and all other companies in the same holding company system are organized and operate substan-

connection with the acquisition by registered holding companies of securities or assets of public utility companies, Congress specifically required compliance with State laws but made an exception "where the [S. E. C.] finds that compliance with such State laws would be detrimental to the carrying out of the provisions of Section 11."

Even where there is no such express provision for an exception from State policy, it has been held that the standards of Section 11 must prevail if there is conflict between the standards of Section 11 and the provisions of a section requiring conformity with State policy. *Public Service Commission* v. *S. E. C.*, 166 F. 2d 784 (C. A. 2), certiorari denied, 334 U. S. 838.[7] Judge Learned Hand points out in that case

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tially in a single State and the acquisition has been authorized by the State commission of that State.

Section 10 (f) provides that the S. E. C. shall not approve the acquisition of securities or utility assets unless it appears to the satisfaction of the S. E. C. that applicable State laws have been complied with, except where compliance with State laws would be detrimental to carrying out the provisions of Section 11.

[7] In that case, the Court of Appeals affirmed a district court order enforcing a plan, which had been approved by the S. E. C., for compliance by a New York public-utility company with the provisions of Section 11 (b) (2). One of the provisions of that plan provided for the reclassification of the outstanding securities and the issuance of new securities by the public utility involved. The New York Public Service Commission refused to permit the issuance of these new securities and contended that as a consequence the plan could not be consummated. It placed strong reliance upon the provision of Section 7 (g) of the Act that the S. E. C. shall not permit a declaration regarding the issuance of a registered holding Company to become effective if the S. E. C. is advised by a State

(166 F. 2d at 787): "A proceeding under § 11 (b) by the Commission itself would obviously be free from control by local state commissions * * *"

Louisiana Power refers to the fact that the S. E. C. has granted an exemption, pursuant to the provisions of Section 3 (a) of the Act, to the Northern States Power Company system which operates both electric and gas properties (Br. 16). There, however, the Commission explicitly stated (*Northern States Power Co.*, Holding Company Act Release No. 12655 (1954), pp. 7-8):

> *Under Section 11 (b) (1) of the Act a gas system may be retained with an electric system only if the standards of Clauses (A), (B) and (C) of that section are met.* However, Congress did not impose a mandate on this Commission to *withhold exemptions* in all cases of combined gas and electric operations merely because the retention of a combined system under strict application of Section 11 (b) (1) may in some cases require divestiture. [Emphasis added.]

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commission that State laws with respect to such issue and sale have not been complied with. In rejecting this contention, the Court of Appeals stated (166 F. 2d at 787) that the requirements of Section 11 (b) are "an end whose realization the Act affirmatively prescribes" and that "[t]his once understood, it becomes to the highest degree unlikely that Congress should have set up a system of dual control over the fulfillment of this purpose; for it is scarcely necessary to expatiate upon the obvious defect of so organizing any official control * * *" The opinion also stated (at 788) that it is "incredible" that Section 7 (g) would be a limitation upon the action of the S. E. C. in fulfilling its duties to effectuate compliance with Section 11 (b).

It obviously cannot be argued on the basis of that case that the standards of Section 11 (b) (1) are not applicable in a proceeding under Section 11 (b) (1).

Louisiana Power also refers to Section 8 of the Act and its legislative history (Br. 16, 21). That section, as finally enacted,[8] deals solely with restrictions upon *future* acquisitions which might be contrary to State policy and does not relate to the permitted *retention* of *existing* combinations of non-related operating properties.[9] If Section 8 has any bearing upon Section 11, it is only to emphasize the opposition of Congress to control under a single holding company of gas and electric utilities, so much so that even if, under the standards of Section 11 (b) (1), a gas property could otherwise be acquired by a system operating electric properties, it would not be permitted if such acquisition were contrary to state policy.

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[8] The legislative history noted at footnote 6 on page 21 of the brief of Louisiana Power relates to a draft of Section 8 as reported by the Senate Committee on Interstate Commerce, and not as finally enacted by the Congress. Among other things, the bill to which this legislative history is applicable provided in Section 8 that the joint ownership of electric and gas properties by a subsidiary of a registered holding company might be *retained* only if the state commission approved such retention. In the bill as finally enacted, that provision was deleted.

[9] See *Columbia Gas & Electric Corp.*, 8 SEC 443, 462–463 (1941).

CONCLUSION

For the foregoing reasons and the reasons stated in our principal brief, it is respectfully submitted that the judgment below should be reversed.

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